

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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APPLE, INC.,

Plaintiff,

-vs-

Case No. 11-CV-178-BBC

MOTOROLA MOBILITY, INC.,

Madison, Wisconsin

November 5, 2012

Defendant.

9:00 a.m.

\* \* \* \* \*

STENOGRAPHIC TRANSCRIPT OF FIRST DAY OF COURT TRIAL  
HELD BEFORE DISTRICT JUDGE BARBARA B. CRABB,

APPEARANCES:

For the Plaintiff: Tensegrity Law Group LLC  
BY: MATTHEW POWERS  
555 Twin Dolphin Drive, Ste. 360  
Redwood Shores, California 94065

Covington & Burling LLP  
BY: ROBERT FRAM  
One Front Street 35th Floor  
San Francisco, California 94111

Covington & Burling LLP  
BY: JASON RAOFIELD  
1201 Pennsylvania Avenue NW  
Washington, DC 20004-2401

For the Defendant: Quinn Emanuel Urquhart & Sullivan  
BY: STEPHEN SWEDLOW  
500 West Madison Street, Ste. 2450  
Chicago, Illinois 60661

Lynette Swenson RMR, CRR, CBC  
Federal Court Reporter  
U.S. District Court 120 N. Henry St., Rm. 520  
Madison, WI 53703 (608) 255-3821

1 Appearances continued:

2  
3 For the Defendant: Quinn Emanuel Urquhart & Sullivan  
4 BY: EDWARD DEFRANCO  
5 51 Madison Avenue, 22nd Floor  
6 New York, New York 10010

7  
8 Quinn Emanuel Urquhart & Sullivan  
9 BY: BRIAN CANNON  
10 555 Twin Dolphin Drive, 5th Floor  
11 Redwood Shores, California 94065

12  
13 Reinhart Boerner Van Deuren, S.C.  
14 BY: LYNN STATHAS  
15 P.O. Box 2018  
16 Madison, Wisconsin 53701

17 Also appearing: David Melaugh, Apple representative  
18 Chester Day, Motorola representative  
19

20 \* \* \* \* \*

21 THE CLERK: Case Number 11-CV-178-BBC. *Apple*  
22 *v. Motorola Mobility* is called for a hearing and first  
23 day of court trial. May we have the appearances,  
24 please.

25 MR. POWERS: Good morning, Your Honor. Matt  
Powers, Rob Fram, Jason Raofield for Apple. David  
Melaugh from Apple.

THE COURT: Thank you.

MR. SWEDLOW: Morning, Your Honor. Stephen  
Swedlow, Ed DeFranco, Lynn Stathas and Brian Cannon,  
along with Chester Day from Motorola.

THE COURT: Thank you. We had a new proposal  
yesterday afternoon from Apple that had two options.

1 One, Apple suggested that we would start the trial today  
2 on the understanding that the Court will set a FRAND  
3 rate according to a method that both parties will agree  
4 to be bound by. I'd like to get some understanding of  
5 what method Apple thinks both parties would agree to be  
6 bound by.

7 And I'd like to also ask why is this new proposal  
8 to include the value of Apple's patents not totally  
9 outside the pleadings; in other words, how is it  
10 connected to the breach of contract claim that you've  
11 been pleading all along?

12 MR. POWERS: Two questions -- I guess there's  
13 three questions involved in that, Your Honor. First,  
14 what methodology -- as you could tell from the trial  
15 briefs, there are different ways presented by the  
16 parties for assessing what a FRAND rate might be. And  
17 the point of the first proposal was that Your Honor may  
18 choose, after you've heard the evidence, one of those  
19 methodologies over others. And the point of the first  
20 proposal was that you wouldn't be hearing evidence about  
21 Apple's patents per se, but you would be adopting a  
22 methodology that could be applied to Apple's patents.  
23 Just as an example, if Your Honor chose a methodology  
24 which said as of 2012, I'm going to use a party's  
25 percentage of declared essential patents to the

1 particular standard and apply that to the base of X,  
2 base defined however you decide it ought to be defined,  
3 that's a methodology. That's a methodology which could  
4 be applied to both Motorola and to Apple.

5 The numbers that one would plug into that formula  
6 are not -- they actually are in the record here, but  
7 it's certainly not been the focus here. But my point  
8 was not that at the end of your order there would be a  
9 statement of what the rate would be for each side, but  
10 there would be a methodology that you would order, which  
11 both sides would agree to be bound by, which would then  
12 end the question because your methodology would decide  
13 the rate for Motorola's patents and would decide the  
14 rate for Apple's patents.

15 THE COURT: So in other words, you would have  
16 experts telling me how they thought I should construct  
17 this method that I would announce at the end of the  
18 trial.

19 MR. POWERS: Yes. The expert reports at least  
20 on Apple's side do so. The expert reports obviously on  
21 Motorola's side, because they do not, as Your Honor  
22 noted in your motions in limine rulings, they do not  
23 render an opinion as to what the proper FRAND rate is.  
24 So you would take the evidence on the record in this  
25 case as it exists and you would reach a decision about

1 what the FRAND methodology is, and as to Motorola's  
2 patents, what that rate is because you have all of that  
3 data, and that same methodology would then be applied to  
4 Apple's patents in a way that I think would not be  
5 controversial, depending on what methodology you chose,  
6 and that would accomplish the twin objectives that Your  
7 Honor stated in your November 2 ruling. One was that it  
8 would be binding, and the second -- because it would be  
9 agreed to be binding by both sides. And the second is  
10 it would actually -- one of the concerns that Your Honor  
11 raised was that you were concerned that a ruling as the  
12 trial had been conceived by Apple, which was that you  
13 would be ordering specific performance in the form of an  
14 order which told Motorola to make a FRAND offer, which  
15 it had not made, one concern you expressed was that if  
16 Apple did not accept that offer, it would not end these  
17 disputes and not be effective.

18 This both solves that and goes further because not  
19 only would it end that dispute, it would end the dispute  
20 about what Motorola has to pay for Apple's patents,  
21 which is the mirror image of the same dispute. And  
22 you're correct that claim is not in this case because  
23 Motorola chose not to bring it. But if the goal is to  
24 make this an effective proceeding and if Motorola is  
25 taken at its word in the first paragraph of its

1 submission to you on Sunday which is that it wants a  
2 license agreement and wants a process to get there,  
3 option one is just such a process, as is option two.

4 THE COURT: So you would agree to be bound by  
5 the rate.

6 MR. POWERS: Yes.

7 THE COURT: The framework. That, of course,  
8 doesn't say anything about whether you would be -- agree  
9 to be bound by the -- all the other aspects of the  
10 licensing agreement such as how long it would last, who  
11 would do the oversight, where the disputes would be  
12 determined, the geographic scope, all of those other  
13 things. How would that be done?

14 MR. POWERS: None of those things has been  
15 discussed other than geographic scope, in which case we  
16 raised the question of worldwide and said it must be  
17 worldwide and explained why. If you had a normal  
18 license agreement, you're right, there would be a number  
19 of terms ranging from boiler plate to not so boiler  
20 plate. But you would have defined the essential term.  
21 And I don't think either side has asked you to write the  
22 agreement.

23 THE COURT: So when you say "according to a  
24 method that both parties will agree to be bound by,"  
25 you're talking about a method that the Court will decide

1 after hearing all of the evidence.

2 MR. POWERS: Exactly. A method of computing  
3 FRAND.

4 THE COURT: Mr. Swedlow, will you be  
5 responding?

6 MR. SWEDLOW: Yes. Motorola would like some  
7 process to end the disputes between the parties, but the  
8 entire dispute isn't before the Court in the form of  
9 Motorola as a defendant in a breach of contract action.  
10 The assertion that Motorola should have somehow placed  
11 at issue Apple's portfolio in this case is turning it on  
12 its head. We can't sue Apple for a breach if Apple has  
13 not sued Motorola on standards-essential patents and  
14 failed to offer a FRAND rate. So we can't file that  
15 lawsuit because it doesn't exist yet. And because it  
16 doesn't exist in this case or anywhere yet, what Apple  
17 is essentially asking this Court to do is determine a  
18 methodology that would apply to a group of assets,  
19 Apple's patents, that we don't know anything about. The  
20 methodology that Apple would like would be based upon  
21 Apple's arguments about Motorola's portfolio. But as  
22 was made clear to me after looking at Apple's 166-slide  
23 opening statement, there are many different ways you  
24 could calculate and can calculate a FRAND rate.  
25 Percentage of the portfolio, just take that example --

1 percentage of the standard, which is what Mr. Powers  
2 just referred to, that may be relevant depending on what  
3 your patents are and how you count them. But you could  
4 be a company that has one patent that is so foundational  
5 to the standard that you can't simply say you have one,  
6 but there are 10,000, because other companies have  
7 declared essential many, many thousands of patents that  
8 are of a different value or of a different type. And  
9 what we don't have in this case from either party is any  
10 -- you will not be able to know what any of the hundreds  
11 of other Motorola patents even relate to within the  
12 standard because no expert is going to tell you, from  
13 either side, Motorola has these hundreds of patents and  
14 these are the numbers and this is what they relate to.

15 The way this process works in the real world, so to  
16 speak, is that Motorola, which is what actually  
17 happened, goes to Apple and says here are some of our  
18 patents. Here are 40 where we've charted the actual  
19 invention against what your product does. And then the  
20 parties engage in technical discussions to determine  
21 whether there is infringement, whether the patent is  
22 essential, what value that patent would have to a  
23 particular product. And in the context of negotiation,  
24 there may be a counting, meaning you have X hundreds of  
25 patents and so the company has X hundreds, but that's



1 not a methodology that not knowing what Apple's  
2 portfolio looks like we could even argue against. You  
3 would be deciding a methodology for basically for all  
4 companies. So Qualcomm and everyone else who owns  
5 standards-essential patents, there would now be a  
6 judicial opinion where only one portfolio was even being  
7 discussed, and in that context, it wasn't even being  
8 discussed on a technical or invention standpoint, just  
9 on counting the patents or whatever methodology Apple  
10 proposes.

11 So even though Motorola does truly want to get  
12 Apple to pay, it can't follow a structure whereas a  
13 defendant in a lawsuit and a methodology is agreed to in  
14 advance without knowing what Apple's portfolio is or  
15 what arguments we might possibly make about that value.  
16 So the methodology would be decided without knowing what  
17 it is the methodology is being applied to except as it  
18 relates to Motorola's patents.

19 THE COURT: So is this -- clearly this is an  
20 argument for why Apple's patents should not be included  
21 in this discussion, but is it also an argument for  
22 saying that the determination of the method that  
23 Mr. Powers is talking about is not an appropriate way to  
24 reach a resolution of the case?

25 MR. SWEDLOW: The appropriate method for

1 valuing a standards-essential portfolio depends on the  
2 portfolio. There is no one method to value different  
3 assets. We own whatever we own in terms of patents.  
4 Apple owns whatever it owns. Qualcomm owns -- there are  
5 other companies that own.

6 What Apple wants this Court to do is to say the way  
7 you would value a standards-essential portfolio in this  
8 case, Motorola -- if Motorola ever tries to engage in  
9 cross-licensing with Apple, you have to accept that  
10 methodology without knowing what the patents are or how  
11 they impact the standard or, for example, when Apple got  
12 the patents. We know Apple had basically no patents  
13 that were standards essential in 2007. Apple has now  
14 acquired standards-essential patents over the years  
15 through acquisitions of companies and just purchases of  
16 patents.

17 So when would you determine what Apple's count is?  
18 I know that Mr. Powers said as of 2012, because I just  
19 know from reading the popular press, Apple got a bunch  
20 of patents from a big Nortel portfolio because they  
21 bought them. But that doesn't have anything to do with  
22 what Apple should pay in terms of a net license fee in  
23 2007. So you can't -- it's not that you can't -- one  
24 cannot determine a methodology to value an asset without  
25 knowing what the asset is. And just because these are

1 patents, that's not good enough to know what Apple's  
2 portfolio is or how you would value it. We can't agree  
3 to a methodology without having the evidence about what  
4 their portfolio is and when they got it.

5 THE COURT: Mr. Powers.

6 MR. POWERS: Yes, Your Honor. I think there's  
7 three points built into that. I'd like to respond  
8 briefly to all three, if I may. The first is a comment  
9 that they don't know what Apple's patents are, and I  
10 think in fairness that's just not true. The parties  
11 have had discussions over the years where both sides  
12 have made presentations to each other about patents;  
13 where both sides have exchanged charts; have exchanged  
14 lists of patents; have gone back and forth about what  
15 those patents cover; have made extensive presentations  
16 about the scope and breadth of patents in both  
17 directions. So the statement that Motorola is ignorant  
18 about what Apple's patents are I believe will be  
19 demonstrably untrue.

20 The second is that the level that Mr. Swedlow was  
21 commenting, it's also not relevant to the way the  
22 parties have set this case up for trial. Neither side,  
23 neither Motorola nor Apple, has suggested that you have  
24 to do a patent-by-patent subject matter analysis of all  
25 of the patents that Motorola has declared to be

1 essential or all of the patents that Apple has declared  
2 to be essential.

3 As Your Honor noted in the motion in limine ruling,  
4 that's probably not even possible. What the parties  
5 have done, for example, one of our experts admitted and  
6 their expert has I think admitted that's an appropriate  
7 methodology is to use the percentage of IPR method.  
8 It's common sensical. Basically it says if there's a  
9 total number of, say, a thousand patents that are  
10 declared essential to a standard and one party has a  
11 thousand of them or 10%, then that party should be able  
12 to charge 10% of whatever the total amount of royalty  
13 burden you're willing to put on that standard. And the  
14 other holders of the other 9,000 get their percent of  
15 shares. If they're all truly essential, they're all of  
16 essentially equal value. Each one is essential. That's  
17 the whole point of --

18 THE COURT: Who decides which ones are  
19 essential?

20 MR. POWERS: You use what the parties have  
21 declared to be essential. And some of those may not be  
22 as truly essential as Motorola has found when it  
23 asserted its eight essential patents that it picked for  
24 its proud list against Apple. Most of those were found  
25 not, in fact, to be essential because they were found to

1 not infringe or invalid. But for this purpose, we agree  
2 with the pragmatic point that Your Honor made in the  
3 motion in limine ruling which is you can't go through  
4 potentially thousands of patents to do that sort of  
5 analysis, so you take on face value the parties'  
6 declared essential patents and apply that percentage.  
7 And our experts have done that. It's a straightforward  
8 calculation. The percentages of IPR really aren't in  
9 dispute. There's a list. And then the only question is  
10 to which base you apply it. And that is in dispute.  
11 And Your Honor would, after hearing the evidence, make a  
12 decision about which base that percentage should be  
13 applied to --

14 THE COURT: And what base are you talking  
15 about? The rate or something else?

16 MR. POWERS: Something else. So, the way one  
17 would compute the overall royalty amount would be to  
18 take a percentage, and this percentage of IPR says that  
19 you apply a percentage based on -- if you're applying a  
20 percentage based on the smallest saleable unit; in other  
21 words, the functionality here relates to a cellphone,  
22 and if you open up a cellphone, there are lots of chips  
23 and components inside that cellphone. One of those  
24 chips provides all of that cellular functionality. So  
25 that one of the debates before you in this trial will be

1 what is the base amount that that rate is applied to.

2 So, Motorola has argued you apply it to the entire  
3 full, fully-loaded sales price of an iPhone, which is  
4 now on the order of I think \$700. Another option is to  
5 go down, as the case law suggests, the *Laser Dynamics*  
6 case, for example, this is all related to patent law  
7 damages because it's how much your patents are worth.  
8 You go to what *Laser Dynamics* -- those that called Laser  
9 Dynamics last month the lowest saleable unit which  
10 embodies the patented functionality, and that's the one  
11 chip inside the phone that provides all of that cellular  
12 functionality. The price of that chip is about \$15.

13 So, if one were to apply a percentage to that \$15,  
14 you come up with a dollar number per phone. And one of  
15 the things that you would see in the evidence is that  
16 various people in the industry have done licenses on  
17 various terms. Some have done it on that lowest  
18 saleable unit basis that I just described. Some have  
19 done it all the way at the other extreme on the full  
20 price of a phone. But when they do it on the full price  
21 of the phone, they don't apply the full percentage  
22 because by definition the entire value of that phone  
23 with all those other chips and all that other  
24 functionality is not all driven by that one cell check.  
25 So they apply a much lower percentage and come up with a

1 much lower number.

2 And there are ways of doing it in between. That  
3 chip can appear on a board with other chips. That board  
4 costs about \$35. Sometimes out of convenience people  
5 apply a percentage rate to the board, in which case  
6 again the rate comes down. So the point of this is that  
7 the goal in licensing and determining a FRAND rate is in  
8 many ways exactly the same goal as a traditional damages  
9 analysis Your Honor is used to performing all the time,  
10 which is determining the value contributed by that  
11 patent.

12 Now, in this case, you have one complicating factor  
13 which is that patent relates to a body of functionality,  
14 a standard, a cellphone standard, where there are  
15 thousands of other patents that also contribute to that  
16 value. So you can't give each owner of one patent 5% of  
17 the value by definition. So this percentage of IPR  
18 methodology is one way that the industry has looked to  
19 to say here's how we're going to take care of that  
20 problem.

21 THE COURT: And what cases do you know of in  
22 which that has been done?

23 MR. POWERS: Well, cases as in law cases or  
24 cases as in licenses?

25 THE COURT: Law.

1           MR. POWERS: As Your Honor noted on Thursday,  
2 we are in fairly novel uncharted territory on this  
3 question with regard to setting a FRAND rate. I'm not  
4 aware of a case that has set a FRAND rate on any  
5 methodology. And I believe neither party has cited one  
6 to you. It is an important topic being discussed  
7 currently in many fora, including regulatory fora,  
8 including legislative fora, and judicial fora. And the  
9 fact that there is no case which has adopted a  
10 particular methodology obviously gives the Court less  
11 judicial guidance, but there is still economic and  
12 licensing guidance available to the Court to help with  
13 that exercise. And the concept that I just laid out of  
14 one methodology, a percentage of IP ownership, is  
15 conceptually I think fairly straightforward. It's not  
16 difficult to understand at all.

17           There are other ways of looking at the problem.  
18 For example, another way of looking at the problem is to  
19 step back and say let's look at the licensor's other  
20 patents or the licensee's, the putative licensee's other  
21 licenses for the same standard as a way of getting a  
22 sense for what other companies out there are either  
23 paying or charging for their standards-essential  
24 patents.

25           Now if you're looking at the licensor's licensing



1 history, you have the benefit that it's the same body of  
2 patents. So that variable stays constant. A variable  
3 that changes is they're licensing another party and that  
4 other party may have a different number of patents to  
5 give back in a cross-license or that a particular  
6 structure of that license might be different because of  
7 idiosyncrasies of that particular negotiation. So  
8 sorting through the impact of those idiosyncratic  
9 variances from the licensor's other patents is a  
10 complication, but a complication of the type that judges  
11 deal with often. The point being if one can decide from  
12 the licensor's own licensing history what the actual  
13 effective rate is that they get; not the original rate  
14 they asked for, but the actual rate they get in real  
15 life, if you can get to a point where you have a sense  
16 of that, that is also something that gives you a sense  
17 of what the actual FRAND rate should be.

18 So hypothetically, without revealing any  
19 confidential information in a crowded courtroom, if  
20 Motorola had licensed to eight other parties at rates  
21 which once analyzed properly ended up at a dollar a  
22 phone or less, that would be persuasive evidence that  
23 the rate that Apple seeks, about a dollar a phone or  
24 less, is an appropriate FRAND rate on two independent  
25 grounds. One, the reasonableness ground, and we believe

1 that the evidence will lead to this place, but I'm not,  
2 again, revealing actual confidential information. Both  
3 on the reasonableness ground because it's evidence of  
4 what that -- those patents are commanding in the real  
5 world as opposed to an initial demand, but also on the  
6 nondiscriminatory aspect of FRAND, which is the "n-d" of  
7 FRAND of course, because if others in the industry  
8 reasonably similarly-situated are paying only about a  
9 dollar a phone or less, than Apple should not be asked  
10 to pay \$12.35 a phone or currently over \$14 a phone,  
11 because not only would that be unreasonable, it would be  
12 discriminatory. So that's the second path. Our view is  
13 that each of these paths, when you examine the evidence,  
14 goes to the same place.

15 A third way of looking at it, and this is a way  
16 that we've looked at it which I believe is public, is  
17 that Motorola licensed a company called *Chi Mei*. Chi  
18 Mei makes the cellular module, the set of chips that  
19 performs the cellular functionality that relates to all  
20 their patents on cellular, and Apple bought that module  
21 from Chi Mei for the original iPhone and Apple paid Chi  
22 Mei a specific royalty rate designed for Motorola  
23 explicitly. Chi Mei said here is the amount you're  
24 going to pay to us on top of the cost of the module and  
25 that is the amount that we will pay to Motorola under

1 our license agreement for all of their patents, their  
2 standards-essential patents.

3 So Apple went out and specifically ensured that it  
4 was licensed to Motorola's patents and paid a fee. And  
5 Motorola accepted that fee for a very brief period of  
6 time before it figured out that it wanted to stop Apple,  
7 and then it purported to suspend that Chi Mei license  
8 because it wanted to come after Apple for more than the  
9 amount it was getting from Apple via Chi Mei. That  
10 amount was also less than a dollar a phone.

11 So when you analyze -- and then when you analyze  
12 the rates that Apple is paying to other licensors of  
13 their essential patents, now here you have a variable  
14 that those other licensors have different numbers of  
15 patents than does Motorola; in some cases, many many  
16 more declared essential patents, in some cases fewer.  
17 But again, if you do an analysis to try and determine  
18 from those other licenses which Apple has obtained for  
19 standards-essential patents for the same standard and  
20 decide from that what an effective rate, an equivalent  
21 rate for Motorola would be. So again, hypothetically  
22 without disclosing confidential business information,  
23 Apple may negotiate a rate with company X where it pays  
24 X amount per phone. But company X, say, has five times  
25 the number of essential patents that Motorola does.

1 Under this methodology, Motorola should not be able to  
2 command the same rate per phone of a company that has  
3 five times the number of essential patents Motorola has.  
4 So you do an analysis, which we've done, which says all  
5 right, we take these licenses that Apple got from our  
6 licensors and we make them equivalent, apples to apples,  
7 if you will, based on the number of patents Motorola has  
8 and that will produce a rate that's equivalent to these  
9 various licensors. Those rates are all below a dollar a  
10 phone.

11 So our view is that once you see the evidence, you  
12 will see that all roads lead to a number that is below a  
13 dollar a phone; whether it's Chi Mei, whether it's  
14 Motorola's other licenses to other companies properly  
15 analyzed, whether it's Apple's other licenses from other  
16 companies properly analyzed, all of those lead to a  
17 number that's below a dollar a phone. And that I think  
18 is the answer to how you would -- how once you hear the  
19 evidence --

20 THE COURT: I understand how that might lead me  
21 to a number for Apple, but how does that lead me to  
22 something that I could apply to Motorola?

23 MR. POWERS: As an example, if you chose a  
24 methodology which said I'm going to take the percentage  
25 of IPR ownership and apply it to the chip price that

1 performs the functionality, which is exactly what *Laser*  
2 *Dynamics* as a case instructs to be done in this context,  
3 that would take Apple's percentage of its essential  
4 patents, which is a known number, apply it to the price  
5 of the chip that Motorola puts in its phones, which is a  
6 known number, and multiply it. It would at that point  
7 be no more complicated than that if that's the method  
8 Your Honor chose.

9 THE COURT: But in terms of evaluating the  
10 patents that Motorola would be cross-licensing from  
11 Apple.

12 MR. POWERS: That's what I was referring to --

13 THE COURT: And nothing but the number of  
14 patents that are declared to be standards essential?

15 MR. POWERS: Exactly. Which is really --  
16 that's what that methodology is. It says you take that  
17 percentage and you apply it to the lowest saleable unit,  
18 as *Laser Dynamics* instructs. And those are both known  
19 numbers.

20 THE COURT: All right. Mr. Swedlow.

21 MR. SWEDLOW: Your Honor, we just heard about  
22 what was characterized as idiosyncratic variances in  
23 negotiations and all of the factors that Apple believes  
24 weigh in its favor to arrive at the same number we were  
25 at a week ago, which is less than a dollar, and if it's

1 less than a dollar and you would apply that to something  
2 not in the case, then Apple would say okay. Those  
3 idiosyncratic variances are exactly why there is not one  
4 methodology for valuing a patent portfolio, even if it's  
5 standards essential. You don't simply count -- the  
6 parties don't, all the negotiating parties, don't simply  
7 count the number of patents, because if you did, then  
8 all that would lead to is parties declaring as essential  
9 a higher number of patents without looking at what is  
10 claimed within the patented technology. It isn't --  
11 patent counting is something that can be done as is  
12 comparison of relevant cross-licenses which would,  
13 without revealing confidential information, they aren't  
14 a dollar. They're much, much more significant than a  
15 dollar when you look at what people have paid for  
16 Motorola's portfolio, which is what we're talking about  
17 here.

18 So we can't agree to a methodology for something  
19 that although Apple says we might know about it as a  
20 company, in this litigation when Apple was asked what is  
21 the monetary value of your portfolio, Apple's attorneys  
22 say "I'll instruct you not to answer to the extent doing  
23 so would reveal attorney/client communication." And  
24 then the witness said "the only way I know that is from  
25 talking to attorneys."

1           So although it may exist in the world that we know  
2     some of their patents, in this case there will be no  
3     evidence of what Apple's portfolio is, what it's worth,  
4     what the patents cover, because Apple -- Motorola was  
5     denied discovery of that.

6           So we can't agree in advance to determine a  
7     methodology for an asset that's not in this case in  
8     order to make Apple pay if you set a rate. I guess I  
9     should take one more step back. There is no rate set if  
10    we didn't breach. So if we're not in breach, there  
11    won't be a rate set. Part of determining whether we  
12    breached is to determine whether or not the requirement  
13    of reciprocal licensing or some aspect of that has been  
14    satisfied by Apple as well.

15          So turning to the question I thought we were going  
16    to address here today is can this Court proceed with a  
17    trial where the discretionary declaratory relief would  
18    actually do something, meaning it would resolve any  
19    dispute between the parties, and simply by counter  
20    proposing that if Motorola accepts a methodology for  
21    some patents that aren't in the case as applied to  
22    theirs, and we just heard a large part of Mr. Powers'  
23    opening statement, we don't agree on the methodology.  
24    We don't agree that the way you would prove the  
25    methodology to the Court is even the same.

1           We will bring in individuals who have negotiated  
2 these complicated licenses for 20 years and they'll  
3 explain to you what parties actually do when they're in  
4 negotiation and what are the actual terms, which we  
5 can't say in open court, of the license agreements that  
6 Motorola has entered into for these exact same patents.  
7 And that number of patents and quality of patents and  
8 what standard is being practiced, that always changes.  
9 So these contracts don't last forever. You would have  
10 to identify what term, now looking back and looking  
11 forward, would we apply to a particular license  
12 agreement that the Court would fashion. But unless the  
13 Court fashions the entire license agreement, there isn't  
14 an effective declaratory remedy that the Court would be  
15 giving to the parties because Apple has to pay on a  
16 license agreement. If Apple says we'll only agree if  
17 you accept the methodology that the Court puts in place  
18 and you don't have to decide the rest of the terms, then  
19 what happens? Where do we go after that? We don't get  
20 any money. So the specific performance of make Motorola  
21 take an amount of money and license us wasn't actually  
22 granted, and we're in the same spot that we were a week  
23 ago.

24           THE COURT: Because there are so many other  
25 issues that have to be decided, is that it?



1 MR. SWEDLOW: Yes. Because the rest of the  
2 license agreement would have to be established in order  
3 to actually make Apple pay. And Apple won't pay if it  
4 doesn't think a product needs to be paid upon, meaning  
5 maybe there's something about a particular model of the  
6 iPhone -- I know Apple will take this position -- that  
7 means Apple shouldn't have to pay or we haven't decided  
8 that -- this patent infringement concept of lowest  
9 saleable unit is a patent infringement concept -- case  
10 law. It's not how do you license a gigantic portfolio.

11 So if we were using that, we'd have to look at each  
12 patent. You can't use patent infringement law to  
13 determine how you would negotiate a fair reasonable and  
14 nondiscriminatory license unless you were using patent  
15 law completely.

16 So that methodology, you can't just adopt a  
17 methodology from some case law in another context and  
18 say that that will be the only way you could do it here.  
19 But in order to get to a declaratory relief, which is in  
20 your discretion, that means something. The entire  
21 agreement has to be established so that Apple will pay.  
22 Otherwise it will be back in some courtroom somewhere to  
23 make Apple pay, both from 2007 to today and then going  
24 forward.

25 MR. POWERS: May I respond briefly, Your Honor?

1 THE COURT: You may.

2 MR. POWERS: Motorola is beginning to sound  
3 like a party that just won't take yes for an answer.

4 THE COURT: Actually it struck me that it has  
5 some very good points.

6 MR. POWERS: Well, where we started is they  
7 wanted Apple to be bound by Your Honor's decision, and  
8 Apple originally said yes, but with caveats. And now  
9 Apple is saying all right, we'll remove most of those  
10 caveats as long as Motorola agrees to be bound because  
11 the Court's desire was to have a process that's  
12 effective in resolving the parties' disputes, and I  
13 think the proposal that we made is more effective. And  
14 Your Honor will be aware that we proposed two  
15 alternatives. One was that if Your Honor is going to  
16 set a methodology that determines what Apple has to pay,  
17 if Motorola agrees to be bound by that same methodology,  
18 we're done. Now Motorola is saying you have to fashion  
19 the entire license agreement down to choice of governing  
20 law terms and dispute resolution. That's a new argument  
21 as of this morning.

22 THE COURT: Well, there are two ways of looking  
23 at that: One is that Motorola is asking for an entire  
24 agreement to be fashioned. I'm not going to do that.  
25 The second is that the nature of a negotiation like this

1 and the nature of an agreement that's going to be  
2 reached is so complex and so detailed that it is not  
3 something that the Court can do or should do, and that  
4 we're back in this position where it would be simply an  
5 advisory opinion by the Court that oh, by the way, by  
6 the time you work out all of these other issues, the  
7 rate should be calculated in this manner.

8 MR. POWERS: I hear the point, but with respect  
9 to I think the gorilla in the room, the issue that needs  
10 to get resolved is the amount both sides pay. Governing  
11 law, those sorts of things, the other provisions are not  
12 holding up these agreements. What's holding up these  
13 agreements is exactly what we've asked you to decide,  
14 the amount that should be paid. And once that's set, I  
15 am -- can I guarantee it? Because I can't speak for  
16 both sides. But common sense tells us that's what  
17 drives this deal.

18 If Your Honor says for the entire  
19 standards-essential portfolio Apple has to pay "X" and  
20 Motorola has to pay according to "Y" formula, this deal  
21 will be done. We're not asking you to fashion --

22 THE COURT: There's another gorilla in the room  
23 and that is what would Apple's patents be worth.

24 MR. POWERS: That's the second half of what I  
25 just said. It --

1 THE COURT: But --

2 MR. POWERS: That Motorola has to pay for  
3 Apple's patents according to the formula and the formula  
4 would be the same formula. All we're saying is --

5 THE COURT: But I'm not sure from what you've  
6 described that I would be able to determine the value of  
7 Apple's patents -- you know, your idea is that this is a  
8 great way to do it. You just count the number of  
9 patents that are declared standards-essential and then  
10 you do a few calculations and you have the answer. I'm  
11 not sure that that is an appropriate way to do this.

12 MR. POWERS: I understand, Your Honor, and  
13 that's why we proposed the second alternative as a  
14 response to that concern. I mean the express reason for  
15 the second alternative was that if Motorola were  
16 unwilling to accept this methodology that you adopt for  
17 their patents to apply equally to Apple's patents, if  
18 they were unwilling to do that, either because they  
19 haven't had a chance to put in evidence that they would  
20 like to put in on that or if more to the point you are  
21 uncomfortable that you're not sure you can fashion a  
22 methodology in this case that should apply in your view  
23 to the Apple patents, if either of those were true,  
24 that's the explicit reason for the second alternative  
25 which says all right, let's solve both of those by

1 deferring this trial for a short period to allow the  
2 parties to put in exactly what that evidence is. And  
3 you'll have then one proceeding which addresses both at  
4 the same time.

5       The second alternative was put in exactly to  
6 address the concern that you're raising and exactly the  
7 concern that Motorola is raising. We put the first  
8 proposal in because it too has attractive features: The  
9 first attractive feature being we're all here and ready  
10 to start a trial; the second feature is one could easily  
11 see a path whereby whatever methodology you chose to  
12 apply to Motorola's patents could then be applied to  
13 Apple's. But we recognized in advance the concerns that  
14 Motorola has raised here. We recognized in advance the  
15 concerns that Your Honor has expressed, and for that  
16 reason set out what we think is a sensible way to  
17 address both of those concerns and to do what at least  
18 Motorola said it wants to do in the first paragraph of  
19 its November 4 brief to you which is have a process that  
20 resolves the parties' disputes and gets to an agreement.

21       And if in six months we could have a hearing before  
22 Your Honor which does that for both sets of patents,  
23 that would be, in my mind, the most efficient way of  
24 resolving the concerns that have been raised and doing  
25 what at least Motorola says it wants.

1           THE COURT: If we proceeded today and I let you  
2 try to prove that this percentage of IPR process would  
3 produce a FRAND rate --

4           MR. POWERS: Yes.

5           THE COURT: -- for anybody --

6           MR. POWERS: Yes.

7           THE COURT: -- Apple, Qualcomm, Samsung,  
8 whoever. And let's say that Motorola showed that you  
9 hadn't met your burden of proving that it did, where  
10 would we be?

11          MR. POWERS: Your Honor would have -- obviously  
12 you haven't heard the evidence yet. I've only briefly  
13 sketched out what that evidence could be.

14          THE COURT: This is a hypothetical. I'm not  
15 judging your evidence at this point. I'm just saying  
16 what would be -- where would we have gotten.

17          MR. POWERS: Understood. My point was that the  
18 evidence isn't limited. The evidence in this trial, if  
19 we started to, would not be limited to that percentage  
20 of IPR. It would be -- it would include the other  
21 information that I went through about ten minutes ago,  
22 which is an analysis of the parties' licenses, both  
23 Motorola's licenses under its patents and Apple's  
24 licenses of standards-essential patents from other  
25 parties on the same standard. So you would have

1 additional evidence from which to formulate a decision  
2 as to what the appropriate FRAND rate might be.

3 THE COURT: So you would identify each of the  
4 standards-essential patents owned by Motorola and Apple  
5 and give me a sense of what each patent covers? Is that  
6 what you're saying?

7 MR. POWERS: That's not at all what I'm saying.

8 THE COURT: Good.

9 MR. POWERS: No.

10 THE COURT: What are you saying?

11 MR. POWERS: None of the evidence really goes  
12 to that, put forth by either party. What I'm saying is  
13 there are multiple ways one could try to figure out what  
14 an appropriate FRAND rate is for a body, a corpus of  
15 patents that relates to a standard. In this case, the  
16 appropriate standard we're talking about is a cellphone  
17 standard, that little chip that provides that cellular  
18 functionality.

19 One way is Chi Mei. You could just decide  
20 theoretically that because Motorola gave a patent  
21 license on exactly the same patents we're talking about  
22 here, the entire body, so we don't need to analyze them  
23 one-by-one, it's the same group, on the same technology  
24 to the same products to the same party for a rate that  
25 was below a dollar a phone, you could say after hearing

1 all the evidence that's the rate for Motorola's patents.

2 THE COURT: But that doesn't help me decide  
3 what Apple's patents are worth.

4 MR. POWERS: I agree. That's why I was calling  
5 that out first as an exception. That is, in this case,  
6 fairly unique for purposes of FRAND and that's one of  
7 the reasons we suggested the second alternative.  
8 Because that is an argument Apple is making that when  
9 Motorola chose to license all of its standards-essential  
10 patents and licensed it at this module level for less  
11 than a dollar a phone and accepted Apple's payments for  
12 the iPhone, the same product, for the same patents and  
13 the same parties, that tells you what FRAND is. It's  
14 negotiated. It's done. It's real world. It's not two  
15 economists debating each other. It's a real world  
16 license.

17 Now that evidence is unique to Motorola because you  
18 rarely find same patent, same products, same parties, et  
19 cetera in a FRAND context. So that might mean if you  
20 chose that as a methodology, it would not be  
21 particularly useful for deciding what Apple's patents  
22 were worth. But you will also hear evidence about all  
23 of Motorola's licenses to other parties on the same  
24 Motorola patents, on the same standard, and Apple's  
25 licenses from other parties on the same standard but



1 with a different set of patents; in other words, those  
2 companies' patents. There is obviously some work to be  
3 done to try to get to an apples-to-apples comparison.  
4 That's why economists and accountants and damage experts  
5 do what they do, is to look at the consideration flowing  
6 back and forth in those license agreements and say here  
7 is the effective rate.

8 I'll give you an example. Without doing any  
9 details, several of Motorola's licensing agreements use  
10 a lump sum approach. So it doesn't just say here's a  
11 percent per phone or a percent per module or whatever,  
12 it says pay us "X." And then if you sell two phones,  
13 you still pay us "X." If you sell a billion phones, you  
14 still pay us "X." The effective rate per phone  
15 obviously is different whether they sell two phones or a  
16 billion phones.

17 So one of the things you have to do is an analysis  
18 that says how many phones have they sold and then how  
19 many phones, even assuming no growth, are they likely to  
20 sell. You take that total number of phones, divide it  
21 by the lump sum, and then you can come up with an actual  
22 amount per unit. That amount per unit in many, many  
23 instances comes out below a dollar a phone.

24 And so that's one way of saying that's an amount  
25 which the parties have -- which the world has started to

1 say is a FRAND rate. Because if you look at agreement  
2 after agreement after agreement and you see a trend, a  
3 pattern, a consistent valuation, even though those  
4 agreements may be structured differently, but at the end  
5 of the day if you see a consistent valuation, that's one  
6 way Your Honor could come to a FRAND methodology which  
7 could apply to Apple's patents or Motorola's patents.

8 THE COURT: Mr. Swedlow, any comments?

9 MR. SWEDLOW: Yes. You've heard a lot of  
10 discussion about alternative methodologies and  
11 information you could consider that are -- some are  
12 unique to the Motorola circumstance, some are not, and  
13 all of which you could consider. Motorola cannot agree  
14 that based on the unique and not unique circumstances of  
15 this case that whatever methodology you would determine  
16 would apply to Apple's portfolio because we don't have  
17 any evidence of the unique circumstances relating to the  
18 Apple portfolio or how Apple has licensed it or how --  
19 we don't know any of that. You won't be able to know  
20 any of that. We can't agree in advance in one trial  
21 where that's not at issue to have that apply to the next  
22 trial.

23 The problem with each of the ways you could compare  
24 a license that have been described to you is that you  
25 have to look at that circumstance. So if Motorola has a

1 lump sum payment license with a company, they enter it  
2 on -- let's say they enter it on the first day of 2010.  
3 Neither party knows how many phones they're going to  
4 sell for the next five years, because if you knew that,  
5 then business would be a lot easier and you could just  
6 trade stocks rather than do anything else for a living.  
7 So both parties have to project or guess. So that lump  
8 sum was based upon what Motorola thought the other  
9 company would sell and it would sell itself, and the  
10 other company had thoughts about what Motorola would  
11 sell and it would sell itself because these net  
12 payments, when you cross-license -- so if -- I'll just  
13 say company "X" so I don't isolate any company. Company  
14 "X" who sells phones and Motorola who sells phones.  
15 Motorola may have thought that it would be the market  
16 leader and sell 40% of the phones and have 75 billion  
17 dollars a year in revenue. The other company may not  
18 have believed the same thing or thought it might sell  
19 more or less, and you only pay on the cross-revenue with  
20 respect to the value of each license.

21 So a prediction has to be made. What Apple is  
22 saying is that you would go back and you would -- you  
23 would go back in time and say what both parties  
24 predicted. Let's assume they were both right and they  
25 knew exactly what both parties were going to do in terms

1 of sales. Then we'll figure out what was actually paid.  
2 But that's not what happened when the agreement was  
3 entered into. Both parties used the lump sum or some  
4 other contract mechanism because they had to enter into  
5 a contract that was going to apply for a period of years  
6 without knowing what was going to happen during those  
7 period of years, including new patents become declared  
8 essential, companies that participate in the standards  
9 participate in the standards and increase their  
10 contribution so even the portfolios change over time.  
11 And without knowing the other asset that we're valuing,  
12 we will not agree to a methodology that would apply to  
13 that asset.

14 It's like saying there's a beautiful orb on the  
15 table, but we're not going to look at it. We're going  
16 to try to value it by looking at other stuff. But  
17 whatever we decide over there is going to apply to this  
18 thing that we won't have any evidence about.

19 I'd like to communicate to you why there's a very  
20 low chance that the Chi Mei module agreement is going to  
21 apply as a surrogate for Motorola's FRAND rate, but  
22 those terms are confidential. It's a bilateral  
23 agreement where we can't reveal it without Chi Mei's  
24 written agreement. I do believe that Apple knows that  
25 term, but they shouldn't, meaning Apple the company,

1 because it was confidential.

2 Apple is saying that agreement should be -- one  
3 part of the agreement, which is the wrong part, should  
4 be the surrogate. It's not the right part of the  
5 agreement. But I can't tell you the terms unless we  
6 clear the courtroom because we owe that right to Chi Mei  
7 and we have that right ourselves. I don't think Apple,  
8 the company, should have known that contract at the time  
9 or today.

10 THE COURT: Apple, is it clear that you aren't  
11 interested in going into this unless you have some sort  
12 of determination of what your patents are worth?

13 MR. POWERS: I would say the following: We are  
14 prepared to go forward starting today under the original  
15 conception that we proposed, which is that Your Honor  
16 will declare a breach of FRAND; declare a breach of  
17 their nondisclosure agreement; declare whatever you  
18 decide appropriate after you've heard the evidence,  
19 because obviously you haven't heard the evidence yet,  
20 and that might include specific performance, it may  
21 include merely a declaration of what the FRAND rate  
22 ought to be, it might be whatever you decide is  
23 appropriate after hearing the evidence. That's option  
24 one.

25 THE COURT: In that case, you would not agree

1 to be bound.

2 MR. POWERS: Correct.

3 THE COURT: So we're back to --

4 MR. POWERS: That's option one.

5 THE COURT: We're back to Friday.

6 MR. POWERS: Option one would be back to  
7 Friday.

8 THE COURT: All right.

9 MR. POWERS: And we believe for the reasons we  
10 expressed on Thursday, that that's entirely appropriate.  
11 The point -- if I may just slightly on that point, there  
12 is a completed contract that we're trying to accomplish.  
13 The point is not that we're trying to do half of a  
14 contract between Motorola and Apple, we're trying to  
15 complete the contract between Motorola and its  
16 standards-essential bodies. That's the contract we're  
17 asking for specific performance of. And Motorola has  
18 repeatedly tried to shift it as if we're trying to put  
19 in half of an agreement between Apple and Motorola that  
20 gives us the option. That's not what this case is about  
21 or ever has been. The contract which was breached was a  
22 contract between Motorola and the standard-setting  
23 bodies. Motorola has already received the consideration  
24 from those standard-setting bodies. Motorola's patented  
25 technologies are included in the standards at Motorola's

1 request.

2       The *quid pro quo* is that once Motorola has already  
3 received that consideration -- and that's considerable  
4 consideration because that's what allows Motorola then  
5 to go out and say pay us license fees. So Motorola has  
6 already gotten its half of the bargain. What we're  
7 saying is complete that bargain. Make Motorola do what  
8 it said it would do in exchange for that consideration,  
9 which is offer a FRAND license. So it's not advisory,  
10 it's not inchoate, it's not a gotcha, it's completing an  
11 agreement which Motorola has already received its  
12 consideration from. That's what we're asking specific  
13 performance for.

14       It's similar to an options contract where if I pay  
15 Mr. Swedlow \$50 for the option of buying something later  
16 and then he refuses to give me the option to buy it,  
17 he's already gotten my \$50 and he has -- the  
18 consideration for that is he has to give me the option  
19 to buy the piece of property.

20       THE COURT: But that's a very specific thing.

21       MR. POWERS: So is this. It's more complicated  
22 to compute, but that's the Court's job. That's what we  
23 do in patent damages analysis every day is decide what  
24 patents are worth.

25       THE COURT: But he doesn't get to come back to

1 you and say well, you know, that's the price. But I  
2 don't think I'll be bound by that.

3 MR. POWERS: The fact that it's more  
4 complicated is different. What we're saying is that in  
5 the options contract, Mr. Swedlow has to give me the  
6 option. That's what I paid my \$50 for. The option  
7 contract doesn't require me to buy it.

8 Now in most cases there you would, and in many  
9 cases here we would. If you do it at a dollar a phone  
10 or in that zip code, I can, without having the authority  
11 to bind Apple in any way, common sense tells you what in  
12 fact would happen.

13 THE COURT: But you could bargain it down a  
14 little more.

15 MR. POWERS: If you say that the FRAND rate is  
16 a dollar, I doubt we'll be able to bargain it down below  
17 that as a FRAND rate for Motorola's patents. That will  
18 govern that agreement. That was my point on Thursday,  
19 which is what's held up this negotiation for three years  
20 is Motorola's insistence on rates that are not FRAND.

21 THE COURT: This is like getting me to be  
22 deciding whether the option that Mr. Swedlow may sell  
23 you should -- he should sell it for \$20 or \$22 or \$23,  
24 that you're going to bargain it away. This is what  
25 really bothers me is that you want me to give you a



1 bargaining chip. You've got this great rate maybe. I  
2 mean if it's below a dollar, I assume from everything  
3 you've said you would consider that a great rate. So  
4 then you can bargain all the other things that are part  
5 of this final agreement for a license and you've got the  
6 power because you've got the bargaining chip that the  
7 Court gave you. And that just -- I just have a lot of  
8 trouble accepting that as something that courts should  
9 be involved in doing.

10 MR. POWERS: I hear you and I understand, I  
11 think well, the Court's concern. But another way of  
12 looking at it, which I think is at least equally valid,  
13 is that the Court is merely forcing Motorola to do what  
14 its commitment to the standards body said it would do.  
15 Let me just say hypothetically, let's say -- let's take  
16 out the negotiation of the uncertainty. Let's assume  
17 that the standard-setting body said a FRAND rate is \$1 a  
18 phone. You have to make that offer. Everything else is  
19 the same. Motorola comes to us and says we want \$12 a  
20 phone, and we say that's not a FRAND offer. And they  
21 say well, we think that's what we're worth. And we come  
22 to you and say -- and that's holding up the negotiations  
23 and we have -- we're unable to negotiate based on that.  
24 And we come to you and say please make them do what  
25 their contract ordered them to do.

1           Here the contract is clear. It must be \$1 a phone.  
2   At that point, if Your Honor ordered them to make that  
3   agreement, yes, you would be influencing that  
4   negotiation. Yes, you would be doing -- having all the  
5   same effects. The only difference is the discomfort you  
6   have in setting the dollar. And that's based on  
7   evidence you haven't heard. Once you hear the evidence,  
8   obviously Motorola disagrees. You might disagree. Our  
9   view is all roads lead to a dollar or less, and when you  
10   analyze that evidence, that's where the evidence will  
11   be.

12           I think that hypothetical addresses the concern  
13   that Your Honor is making because if you strip out the  
14   perceived difficulty in getting to the number, which is  
15   based on not having heard the evidence yet, if you strip  
16   that away, I don't think Your Honor would have the same  
17   discomfort ordering them to offer a dollar because it's  
18   exactly what they said they would do. It's merely  
19   completing the contract. And in that case, yes, that  
20   would give us finally an ability to negotiate a sensible  
21   agreement because we would have "the power" to negotiate  
22   from the point of them only being able to charge a  
23   dollar. But that hypothetical really isn't any  
24   different at all from the set of facts we have here  
25   other than there's nothing that says in advance it's a

1 dollar.

2 But that level of complication --

3 THE COURT: But that would be something that  
4 Motorola would have known when it went into that  
5 contract with ETSI or IEEE.

6 MR. POWERS: Motorola knew that it was getting  
7 less than a dollar from us through Chi Mei. It knew  
8 that when they came and demanded \$12.35. The timing is  
9 square.

10 THE COURT: But they're a third party -- you  
11 are a third-party beneficiary of this contract between  
12 ETSI and Motorola.

13 MR. POWERS: True.

14 THE COURT: Motorola and ETSI did not agree on  
15 a 93 cent, 97 cent, 98 cent, one dollar --

16 MR. POWERS: True.

17 THE COURT: -- rate. So coming in to enforce  
18 that contract price is a lot different from asking --  
19 and I don't think that determining a rate is all that  
20 difficult. I mean it will take some time, and you  
21 certainly might not agree with what I determined, but I  
22 don't think it's -- I don't think it's very difficult.  
23 I just wonder, as you can tell from this whole  
24 discussion, whether that is something that a court  
25 should be doing in this situation.

1 MR. SWEDLOW: Your Honor --

2 MR. POWERS: And in our view, Your Honor, in  
3 our view there's no other, as Judge Robart in Washington  
4 observed, there's no other place to get it resolved.  
5 ETSI didn't say what the FRAND rate should be.  
6 Obviously a licensor can't decide it unilaterally.  
7 That's apparent, I think, to everyone. And if you have  
8 a licensor, a putative licensor who says -- who uses a  
9 demand for putative competitive purposes, which is what  
10 we think is happening here -- I mean the whole purpose  
11 of a standard-setting body is that anyone who wants to  
12 produce a cellphone can, and what Motorola is doing, in  
13 our view, is adopting a deliberately unreasonable  
14 licensing approach, as to Apple, because it is uniquely  
15 concerned about Apple's competition in the smartphone  
16 space and it would rather try to keep an injunctive  
17 threat from its patents as a way of trying to compete  
18 with Apple in exactly the way the standard-setting body  
19 is designed to preclude. That's exactly what the  
20 standard-setting body was trying to prevent. Everybody  
21 gets to produce a cellphone. That's the whole point of  
22 it. But if you have one party that has a lot of patents  
23 that unilaterally says all right, we're willing to do a  
24 deal with all of these other competitors because we've  
25 been able to compete effectively with them, but all of a

1 sudden our lunch is getting eaten by Apple and we can't  
2 compete. So instead of licensing Apple on terms that  
3 are as reasonable as what we've done with others, we're  
4 not going to license Apple. We're not going to change  
5 our terms the way we did with everybody else. We're not  
6 going to discount heavily the way we did with everybody  
7 else. We're going to stand on our -- basically our  
8 original number, and at that point we know a deal won't  
9 get done and then we're going to use our patents.  
10 That's exactly what the standards bodies are designed to  
11 prevent. And nobody, nobody can stop that other than a  
12 court.

13 This claim is brought before you. You acknowledge  
14 it's a contract. You've held it's a contract to which  
15 we're a third-party beneficiary. All that's left is to  
16 say make them perform the second half of that contract.  
17 And all that's left from that is the evaluation of what  
18 their FRAND rate is, which as Your Honor said, takes  
19 time and effort, but is doable. That is all we're  
20 asking. That is option one.

21 At this point, this was sort of a long-winded  
22 answer to Your Honor's question which is at this point  
23 where are we and the answer is there's three options in  
24 our mind. That was option one. We believe that option  
25 is still right. You have the power to order specific

1 performance of them. You have the power to do that  
2 because it's completing the contract, not just advisory.  
3 But option two is the first option that we discussed at  
4 some length this morning where we continue to have the  
5 trial, but both sides agree to be bound by the  
6 methodology you choose because it ought to be equal  
7 playing fields.

8 The third approach, which I haven't heard Motorola  
9 respond to, is the one where we said all right, defer  
10 the trial for a short period. Let Motorola provide the  
11 evidence it's now said three or four times it wants to  
12 provide about Apple's patents, whatever that is, and  
13 have one proceeding in front of Your Honor where you  
14 have both sides of the equation and you decide what  
15 FRAND rate Apple should pay Motorola, what FRAND rate  
16 Motorola should pay Apple, and both are bound by that.

17 So I think we've responded to Your Honor's concerns  
18 about having a procedure that's effective. We've  
19 proposed three. We're heard no response from Motorola  
20 really as to the third, which seems to address each  
21 concern it raises. On any of those three we're prepared  
22 to go forward because the first -- and one of the points  
23 that Your Honor made as to the first proposal, which was  
24 the original one, is that it doesn't accomplish  
25 everything. And that's true. But the fact that a

1 decision in a case doesn't accomplish everything doesn't  
2 mean that it accomplishes nothing.

3 By setting the FRAND rate that Apple should pay to  
4 Motorola for its patents would break the logjam. Apple  
5 has been very transparent, by the way, to Motorola. We  
6 have sent Motorola a letter saying here is how we would  
7 compute FRAND for our patents to you. We're willing to  
8 live by the same standard back and forth. Here is the  
9 standard that everybody ought to adopt. We have been  
10 very transparent and upfront about that. So the idea  
11 that they have no idea what ours is worth, we sent that  
12 to them long ago.

13 So all of that is available. Any of those three  
14 options in our view is appropriate jurisdictionally. It  
15 solves varying degrees of the problem, and each one has  
16 different strengths and weaknesses. So the shorter  
17 answer to Your Honor's question is we believe all three  
18 of those options are viable. We believe the third  
19 addresses everybody's concern, and we've not yet heard a  
20 response to that.

21 The second, we believe, addresses clearly Your  
22 Honor's concern about whether you're doing something  
23 that's effective. It will be effective. Both sides  
24 will agree to be bound by it. If Motorola does not  
25 agree to be bound, then obviously we can't force them to

1 be bound, but I think it starts to make clear what their  
2 real motivations are. They want it one way.

3 THE COURT: Thank you.

4 MR. SWEDLOW: Can I briefly respond?

5 THE COURT: Um-hmm.

6 MR. SWEDLOW: The problem -- let me start with  
7 the third and come up to the first. Like we have said,  
8 Motorola is interested in resolving this dispute  
9 completely. If that would be in the form of binding  
10 arbitration with a mutually selected arbitrator or panel  
11 of arbitrators who have licensing experience that may be  
12 relevant to that and both portfolios are placed at issue  
13 and that arbitration leads to a cross-license with both  
14 parties being bound to either pay or collect and the  
15 geography is defined and all the terms are in there so  
16 that somebody will pay somebody, we would love that.

17 The problem is where we are now before you on this  
18 breach of contract claim is not the hypothetical where  
19 ETSI said it's a dollar. Because if ETSI said --  
20 obviously Apple would accept a dollar because it's  
21 ridiculously low. But let's say they said it was \$10 or  
22 let's say they said it was 2.25% in value or whatever  
23 ETSI had said to set a rate, you know from your orders  
24 that ETSI has said that is a -- the rate is a commercial  
25 term to be negotiated between the parties and we're not



1 setting any rates. That's what the ETSI entity as a  
2 party to this contract has said.

3 If the rate was \$10 and that was our contract with  
4 ETSI, we get \$10, and Apple came into this court and  
5 sued you to get specific performance for \$10, then they  
6 would have to pay when they win the case. They'd have  
7 to give us \$10. And Apple doesn't want to be bound to  
8 pay unless we agree to something else or the rate is a  
9 dollar, and then of course they would pay because that's  
10 so low they'd be a fool not to pay.

11 So option one is where we were on Friday -- it  
12 seems like a long time ago -- but where we were on  
13 Friday where if Apple won't agree to pay, then specific  
14 performance isn't a discretionary remedy that leads to a  
15 resolution.

16 Option two. We don't have -- we can't and won't  
17 agree to a methodology without Apple's patents being  
18 part of the process for deciding that methodology. You  
19 heard a lot about a lot of different kinds of  
20 methodologies that could be used to both value and pay  
21 on the portfolio: Lump sum; patent counting; looking at  
22 the actual technology; looking at comparable licenses  
23 for Motorola's portfolios; looking at licenses that two  
24 parties have with each other that somehow relate to  
25 Motorola's portfolio. If the methodologies consider

1 everything you could possibly consider, we'll agree to  
2 that. But that's not a methodology, that's just  
3 deciding what a portfolio is worth.

4 So if what we're really talking about is option  
5 three, then we would agree to -- this Court on the  
6 current complaint doesn't have before it the right  
7 posture to set a cross-license for patents that aren't  
8 at issue and patents that are only at issue in a breach  
9 of contract context. But we would be willing to go  
10 somewhere and have it be binding that all of Motorola's  
11 standards-essential patents and all of Apple's  
12 standards-essential patents would be cross-licensed and  
13 a net payment would be determined. We would love that.

14 THE COURT: When you say you would be willing  
15 to go somewhere, what are you talking about? Going to  
16 binding arbitration or trying this case in six months?

17 MR. SWEDLOW: Either. You don't have that case  
18 before you so we have to construct something that  
19 becomes that case and putting it before you.

20 THE COURT: And that's definitely a problem in  
21 my mind. Apple had -- has had 20 months to construct a  
22 case and here we are gathered for trial and it's trying  
23 to expand that case.

24 MR. SWEDLOW: The complaint you have now is a  
25 breach of contract claim, and if we didn't breach that

1 contract, then there's no breach and there wouldn't have  
2 to be a remedy of specific performance with a  
3 cross-license and all the other stuff. So the current  
4 complaint that you have is not the right complaint to do  
5 that. The question would be if we're going to do that  
6 in binding arbitration, which we would agree to, or  
7 before Your Honor, we have to place what it is, option  
8 three is that Apple has described before you. There  
9 were three conditions with respect to that which we can  
10 address. I think we can probably figure out how to  
11 solve those conditions so we could agree, but that's not  
12 -- that's not this case. That would be a different case  
13 that you could resolve.

14 THE COURT: That's exactly --

15 MR. POWERS: May I respond briefly, Your Honor?

16 THE COURT: Um-hmm.

17 MR. POWERS: It sounds as if we've finally  
18 gotten Motorola to agree it would agree to option three.  
19 And then the only question --

20 THE COURT: But not necessarily in this case.

21 MR. POWERS: Well, that's what I was just about  
22 to address. I think that's the simplest thing we have  
23 before us. That would just involve a motion to amend by  
24 both sides the claims before you slightly to add that  
25 half of the equation to it. That mechanically is quite

1 simple.

2 THE COURT: And what about the proposal for  
3 binding arbitration?

4 MR. POWERS: That hasn't been raised before, at  
5 least with me. We'd obviously have to talk about it.  
6 Our suggestion is that we follow option three, if that  
7 is, in fact, the option that Motorola will agree to and  
8 if Your Honor would agree to it. As I say, mechanically  
9 that's a simple amendment to the complaint and  
10 counterclaim.

11 THE COURT: Well, it is, but I have some real  
12 reluctance to let you amend a complaint at this point.  
13 You've had a chance to make a case on the claims that  
14 you raised and that you amended and I don't think that  
15 you've made that case.

16 MR. POWERS: Well, with respect, Your Honor, I  
17 believe we've made the case in spades with regard to  
18 whether there's a breach, and I think the dispute that  
19 came up on Thursday -- Wednesday was what scope of  
20 relief would be permitted, and that was an issue raised  
21 for the very first time by Motorola at that time.

22 THE COURT: I assume you mean that you have --  
23 you have at least alleged a case for breach of contract.

24 MR. POWERS: Certainly.

25 THE COURT: You certainly haven't made the

1 case; right?

2 MR. POWERS: We've stated what the case would  
3 be in the trial brief, for example. We've obviously not  
4 put in any evidence. Of course you're correct. But I  
5 believe the case as laid out in the trial brief and in  
6 the expert reports and as has been prepared and ready  
7 for trial, would, when you heard the evidence, make the  
8 case in spades. And what's been debated for the last  
9 three days is not that, but what scope of relief  
10 ultimately should be given. And where all this arose  
11 was not a last minute request from Apple, but a last  
12 minute change from Motorola where it was asking for  
13 affirmative relief that it had not pled. It was asking  
14 that on a claim where Apple was saying make specific  
15 performance to order them to make an offer, which was  
16 completing their contract with ETSI, Motorola then asked  
17 for an order from the Court affirmatively ordering Apple  
18 to accept that order, which is outside the pleadings and  
19 outside the contract.

20 THE COURT: And I explained why I didn't think  
21 that that -- as I now understand the request, that that  
22 was something that a court should do. And I'm thinking  
23 about that a lot, and perhaps thinking about it in the  
24 sense that I could say yes, this offer was within FRAND  
25 terms; no, it wasn't, and just leave it at that. But

1 what offer would I be considering? There's the initial  
2 offer in two thousand whenever that Motorola refused to  
3 accept. But if there's ongoing negotiation and there  
4 are offers made along the way, that would be within  
5 FRAND terms.

6 MR. POWERS: Those are all things that Your  
7 Honor would have to consider, but --

8 THE COURT: So you're not -- all right.

9 MR. POWERS: If I may.

10 THE COURT: Yes.

11 MR. POWERS: From our point of view where we  
12 are is as follows: The debate hasn't been on whether  
13 there's a breach -- there would be a debate at trial of  
14 course. But as to the debate in the last three days has  
15 been the extent of remedy Your Honor would order if a  
16 breach were found. In our view, undeniably if a breach  
17 were found, we would be entitled to a declaration that  
18 there's breach, and a finding that there's breach.

19 Now whether Your Honor would order specific  
20 performance, that goes into the issues we've been  
21 debating back and forth. Our view is you can order  
22 specific performance of an option contract without that  
23 affirmatively requiring that person to take it because  
24 that's not part of the contract. And that's not  
25 advisory, that is completing the circle of the agreement

1 that the option contract created. That is exactly  
2 what's happening here.

3 But in our view, the issue isn't whether Apple has  
4 changed the claim, the claim is the same. We're asking  
5 for this relief we're asking for. There's been a debate  
6 about whether the ultimate relief that we've asked for  
7 would be given by Your Honor. In our view, you really  
8 can't decide that until you've heard the evidence. But  
9 at a minimum --

10 THE COURT: You're saying the ultimate relief  
11 would be a declaration that the rate offered by Motorola  
12 was outside the bounds.

13 MR. POWERS: The ultimate relief would either  
14 be specific performance of an offer at a rate that you  
15 decided was FRAND or a declaration that the rate would  
16 be FRAND. Lesser-included relief would be a declaration  
17 that their -- a finding of breach because their rate  
18 wasn't FRAND or a finding, a declaration that their rate  
19 wasn't FRAND. Those are all lesser-included findings  
20 that would be appropriate from a finding of breach.

21 All this other -- we talking about the  
22 nondisclosure portion, which is entirely separate from  
23 this and a separate claim which also should be tried.

24 THE COURT: No, that will not be tried. I will  
25 not change my mind from the Friday order.

1           MR. POWERS: Then let's stay with the FRAND  
2 point.

3           THE COURT: All right.

4           MR. POWERS: On the FRAND point, with respect,  
5 I don't think it's fair to say that Apple hasn't made  
6 its case. We haven't had a chance yet to make our case.  
7 But we will establish breach, and we should, under  
8 normal rules of procedure, be entitled to findings  
9 resulting from that. Whether we're entitled to all of  
10 the relief we seek or only some of it is something that  
11 you can and presumably would decide after you've heard  
12 all the evidence and decided what relief is appropriate.  
13 But the fact that that relief would not accomplish  
14 everything the Court may wish to try to accomplish  
15 doesn't mean that that relief is inappropriate. That's  
16 our view as to where we are here.

17          Now, we're long past that at some level because  
18 Your Honor's order has invited a broader discussion, and  
19 our proposal made some -- yesterday at noon was an  
20 attempt to respond both to the broader discussion that  
21 Your Honor raised about trying to solve the whole  
22 problem and to some of the concerns that Motorola had  
23 raised. And what I'm now hearing is that Motorola would  
24 agree to option three, which does address completely, I  
25 think, the issues that Your Honor raised about whether



1 you would be doing something useful. This would even be  
2 more useful than what had been proposed and it solves  
3 Motorola's concerns, as Motorola has agreed, to allow it  
4 to put in the record about Apple's patents and for Your  
5 Honor to hear a balanced even side from both sides. And  
6 if all it requires is a simple amendment to the  
7 pleadings and we move on and schedule a trial on your  
8 court's calendar at an appropriate time, that seems like  
9 the appropriate resolution of everyone's concerns.

10 THE COURT: And what is your response to the  
11 offer to enter binding arbitration that Motorola has  
12 just made?

13 MR. POWERS: I would need to discuss it with my  
14 client and consider it.

15 MR. SWEDLOW: Your Honor --

16 THE COURT: I would ask that -- then we'll take  
17 a break.

18 MR. SWEDLOW: The problem with simple amendment  
19 to the complaint is we didn't breach. And so when you  
20 find there is no breach, then we can't get paid because  
21 this complaint doesn't have a mechanism where when we're  
22 not in breach, Apple still has to pay. So it's not that  
23 you have or don't have jurisdiction. We have to give  
24 you a new case, just like we would be giving to an  
25 arbitrator and say even if 2.25% in net value, which is

1 what Motorola actually gets, is what we offered them and  
2 we gave them all of these other options which you will  
3 see, if we ever do a trial on this, we never breached.  
4 They never paid. We want to get paid now and they want  
5 to cross-license. We have to be found to have breached  
6 in order for you to say as a breach, I'm going to order  
7 specific performance and this is the number or rate or  
8 whatever term that I'm going to enforce against both  
9 parties.

10 But if we look back at what this complaint was,  
11 this was a complaint for a breach and damages, and Apple  
12 dropped its claim -- first changed and then dropped its  
13 claim for damages and sought nominal damages. But Judge  
14 Posner, I'm going to call it a *related case*, the other  
15 case related to some patents at issue here, said, and  
16 I'm quoting from our brief: "You can't go into federal  
17 court and say you had an contract with 'X' and 'X' broke  
18 it and you're really annoyed, even though you sustained  
19 no injury of any sort. So please give me a judgment for  
20 one dollar that I can pin on my wall."

21 You can't do that. And when they dropped their  
22 claim for damages, they aren't entitled under Article  
23 III or the practical means of this court to say you  
24 still can declare that they breached even if there's no  
25 remedy that actually resolves the dispute. They're

1 not -- Apple is not entitled to that once it drops its  
2 claim for damages. If Apple was seeking damages, then  
3 there would be some justiciable issue if we breached.  
4 But if we breached, and all you can do is say you  
5 breached, as you pointed out in your order, that doesn't  
6 resolve anything. That says we breached.

7 But if you set a rate, as if ETSI had set a rate,  
8 then that is the rate that has to be paid. That's the  
9 entire dispute, is your discretionary grant of  
10 declaratory relief should mean something or it's a  
11 useless thing because there are no damages at issue in  
12 the case other than nominal -- so if you insert \$20 for  
13 \$1, in this context, it's the same. Apple reduced its  
14 claim from damages to no damages. If all that's left is  
15 your discretionary relief and it doesn't mean anything,  
16 then there's nothing for the Court to do.

17 THE COURT: Would your argument apply if I set  
18 a rate -- if I said it was going to be \$3.10?

19 MR. SWEDLOW: Frankly, you'll see that that's  
20 too low also. Let's -- if you set a rate that we liked,  
21 we can't collect, because what's our mechanism to  
22 collect? If we breached and you set a rate, Apple is  
23 not going to pay it. So you just set a rate. That's  
24 all that happened. It doesn't do anything. Where do we  
25 go to get that money?

1           We have to go file 500 patent infringement patent  
2 lawsuits to collect on all 500 patents? Because in a  
3 patent infringement case, the current law is you can't  
4 collect on patents that aren't actually in the case. So  
5 we have to put all our patents into a case. Apple has  
6 said if you set a rate of, let's say, \$10, we're not  
7 going to pay. But if you set a rate at \$1, you still  
8 can't make us pay, but we'll voluntary pay. That's why  
9 we wound up here. Because Apple dropped its claim for  
10 damages. Any number you would select is an option, as  
11 they said, but that isn't -- in your discretion for  
12 declaratory relief giving Apple an option to take or  
13 leave a rate, even if it's \$1, they only said they would  
14 voluntary do it. They're not actually agreeing to be  
15 bound.

16           It isn't before you. So if we amend the complaint,  
17 it would have to be something totally new where the  
18 parties say Judge Crabb is going to be able to decide a  
19 rate, whether or not Apple -- whether or not Motorola  
20 breached, and we're going to show you all of Apple's  
21 patents and figure out what the net value of the two  
22 portfolios would be, and whatever number you determine  
23 and however we're supposed to pay it, whoever pays it  
24 has to pay it. That's not an amendment of the  
25 complaint. It's for sure something we would like to do

1 in binding arbitration or here, but it isn't the context  
2 of just changing the complaint so this complaint adds  
3 another claim.

4 THE COURT: Okay. We'll take 15 minutes.

5 (Recess 10:30-11:10 a.m.)

6 THE CLERK: This Honorable Court is again in  
7 session. Please be seated and come to order.

8 THE COURT: Now I've said several times that I  
9 really can't figure out any way that Apple has been  
10 injured that could be redressed by the request that  
11 Apple has made for relief in this case.

12 Mr. Powers, we've gone over this a lot, but just  
13 how would an order declaring that Motorola breached its  
14 contract with ETSI by its initial FRAND offer help you?  
15 What specific help would it give you other than a  
16 bargaining chip or an affirmative defense against  
17 infringement cases?

18 MR. POWERS: I guess I would have two answers,  
19 Your Honor. First is that it would be appropriate  
20 relief for the claim that's been brought. And I would  
21 reiterate --

22 THE COURT: What's the injury and what would be  
23 the redress?

24 MR. POWERS: Well, okay. Injury is a separate  
25 question. The injury that we've suffered is that we've

1 been subjected to litigations all over the world and  
2 threats of additional litigations all over the world  
3 that we should not have been subjected to, if, in fact,  
4 they had made a FRAND offer back in 2007 or 2010. And  
5 if we had accepted that offer, we would have been  
6 licensed. All of those litigations and all of those  
7 threats of litigations would not have occurred. The  
8 fact that we have decided not to seek damages for that  
9 does not mean that we haven't been injured. So those,  
10 you obviously have to keep those as separate categories.

11 And the injuries I think have been clear. We've  
12 been subjected to litigation and threats of litigation  
13 that are improper. They are improper because a party to  
14 a standard-setting body agrees to make an offer that is  
15 FRAND so that anyone practicing the standard can  
16 practice without fear of litigation or exclusion. That  
17 is the whole purpose of a standard-setting body. And if  
18 we're right about breach, then in our view your  
19 declaration of what is FRAND, if that's the only relief  
20 you grant -- obviously if you order a specific  
21 performance or if you go further as the way we've asked,  
22 your relief is then more effective. But if all that you  
23 do is to declare that their breach was FRAND and if you  
24 don't declare what FRAND is, then that is obviously less  
25 effective than declaring what FRAND is. But the measure

1 of whether a case should go forward, in our view, isn't  
2 determined in how effective that relief is in resolving  
3 various geopolitical disputes. If you want to be  
4 completely effective, you adopt option two or three.  
5 The relief we've sought is, as we explained on Thursday,  
6 effective in the sense that it will change -- it will  
7 preclude Motorola from being able to do what it has done  
8 to date which has precluded, in our view, an agreement.

9 Now Your Honor asked me on Thursday whether I could  
10 guarantee that an agreement would result should you  
11 grant us the relief we've sought, and obviously I can't.  
12 But that doesn't mean that the relief you would be  
13 granting would be ineffective. It merely means it's  
14 uncertain as to that particular forward course.

15 But the idea that -- and Motorola has attempted to  
16 position this that the Court is merely being used as a  
17 pawn in a negotiation strategy. That's not it at all.  
18 What's happening is we are asking the Court's assistance  
19 to have the negotiation proceed according to rules that  
20 ETSI set. That's all.

21 THE COURT: And how does the inability to get  
22 the offer injure you in any real way if you're not  
23 prepared to accept it?

24 MR. POWERS: We have not said we're not  
25 prepared to accept it. We've said that we are prepared

1 to accept many offers. We just aren't going to write a  
2 blank check for an unknown offer. And ETSI rules don't  
3 require that.

4 So in terms of the specific relief sought by the  
5 specific claims in the case, which merely asks the Court  
6 to complete the ETSI contract, not to complete a  
7 contract between Apple and Motorola that is a license  
8 agreement, that's not the agreement that's being  
9 breached here yet. We're asking you to complete the  
10 contract between ETSI and Motorola under which, as I  
11 said earlier, Motorola has already received its  
12 consideration and yet has failed to live up to its half  
13 of the bargain which is making the offer. That's all we  
14 want. And if they make that offer, and if that offer is  
15 in the range that we said we think it would be, we've  
16 told the Court we'll accept it.

17 What we can't do is do a blank check for accepting  
18 the result of a methodology here that might produce a  
19 number that we think is wrong unless that same  
20 methodology, and that was option two that we proposed,  
21 is applied bilaterally. And that again, I think,  
22 addresses both your concern and Motorola's concern.  
23 Motorola is not willing to do that.

24 If the same methodology is applied to both sides,  
25 then I've said we're willing to accept that in a binding



1 way.

2 THE COURT: If I were to just decide whether  
3 Motorola had breached its contract with ETSI, that would  
4 mean that I would be deciding first of all was the  
5 initial offer within the FRAND guidelines as an initial  
6 offer. And then if I decide that it was, then I'd have  
7 to look at what else happened. It's pretty hard to say  
8 that any one offer would have to comply with FRAND  
9 guidelines if there's an ongoing negotiating posture.

10 MR. POWERS: Our view on that, Your Honor, is  
11 that the decision on FRAND, as we said before on  
12 Thursday and elsewhere, the decision on FRAND is not  
13 driven by whether their initial offer was or was not  
14 FRAND. We don't think it was. But that's not what  
15 decides the question of breach.

16 And we think that Your Honor put it well in your  
17 motion in limine ruling where you said the question at  
18 that point is really whether -- what the state of  
19 negotiation was at the time they filed suit in late  
20 2010. Because at that point, we're past the initial  
21 offer; the parties have had numerous back and forths;  
22 and there is a clear offer on the table at that point,  
23 at the point at which they initiated suit. And the  
24 reason that's a good line is because of exactly the  
25 reason that Your Honor put in the motion in limine order

1 which is, well, if at that point Apple had done what it  
2 was supposed to do, which is offer a cross-license of  
3 its essential standard patents which it had, and if at  
4 that point Motorola's demand was still two-and-a-quarter  
5 percent of the full ASP, which it was, then that -- then  
6 at that point you can measure whether they had complied  
7 with FRAND before they did something that is  
8 inconsistent with FRAND, which is suing.

9       So I don't think either side says you have to make  
10 26 FRAND determinations based on what the parties said  
11 on September 10 versus September 15.

12       THE COURT: So it would just be that last one.  
13 I did want to explain a couple of things. One is I  
14 can't accept the argument that Apple made that the trial  
15 should proceed on a breach of contract claim because  
16 it's entitled to nominal damages. I haven't found any  
17 case in which a court allowed that to happen. There  
18 certainly are plenty of cases in which courts have said  
19 after the party was unable to prove its damages or it  
20 came up short or the calculation was just so complicated  
21 that it couldn't be decided by a court or jury. But the  
22 idea that anyone starts out in the beginning by asking  
23 for nominal damages and then wants to proceed, it seems  
24 to me, and particularly in this case, this is just  
25 another way of asking for declaratory relief.

1           Also, you had asked for reconsideration of the  
2   October 29th order on the ground that the Court did not  
3   consider the implied covenant of good faith and fair  
4   dealing, but you never raised that. You mentioned it in  
5   one footnote, but you didn't develop any argument on it.

6           And then finally, on the claim for declaratory  
7   relief on the '898 patent, I can't find any persuasive  
8   reasons for granting Apple that kind of relief. First  
9   of all, there's no likelihood that Motorola can or will  
10   sue Apple on the '898 patent because Judge Posner  
11   dismissed Motorola's claims of prejudice after it was  
12   unable to prove damages. And yes, the ruling could be  
13   overturned on appeal, but until then, Motorola cannot  
14   maintain a suit against Apple on the '898 patent. And  
15   if the ruling is overturned and the issue is remanded to  
16   the court in Illinois, then that issue can be litigated  
17   there.

18           Also, I haven't found any case and Apple has not  
19   identified anyone that would support an order of  
20   exclusion if Motorola were found to have breached its  
21   obligation to disclose patents to ETSI when it failed to  
22   disclose the '898 patent. And even if it were, the  
23   remedy that Apple is seeking is so far out of proportion  
24   to any harm that Apple has suffered or is likely to  
25   suffer that I would not impose such an order.

1           So that -- in any event, if we went forward, it  
2       would only be on the issue of this alleged breach of  
3       contract as to the failure to set -- to offer a FRAND  
4       rate.

5           And Mr. Swedlow, anything further on that matter?

6           MR. SWEDLOW: Yes, Your Honor. You didn't hold  
7       in your motion in limine ruling that the critical  
8       question is the day before we filed the lawsuit. But  
9       even if you had, the question is whether or not the  
10      negotiations leading up to that moment and at that  
11      moment were consistent with FRAND. The determination  
12      that Apple -- the determination that Motorola breached  
13      its FRAND obligation doesn't lead to any resolution and  
14      it's within the Court's discretion as to whether or not  
15      to grant declaratory relief.

16           The posting on the wall that Motorola has breached  
17      is not considered -- it's generally not considered  
18      something the Court should do in terms of specific  
19      performance. And if a number is set, I haven't heard  
20      and don't know of any argument why -- we're not saying  
21      the Court is a pawn, but what the Court has done is  
22      established at least a ceiling with what Apple might pay  
23      with no way for the dispute to actually be resolved. So  
24      the result of that would have to be that Motorola --  
25      unless Apple wins and gets the number it wants and then

1 voluntarily pays, if Apple wins that we breached but  
2 doesn't win the number they want, then Motorola is left  
3 with having to file some number, I'm saying 500, not  
4 that it would be 500 lawsuits, but some number of patent  
5 infringement lawsuits to collect a ceiling of whatever  
6 this number you set was.

7       So it won't resolve anything. We won't agree to  
8 the establishing of a methodology for Apple's patents  
9 when they're not in the case.

10       With respect to whether or not we could present to  
11 you the entirety of a cross-license with everyone's  
12 patents included and you could determine the rate,  
13 there's no complaint we can give you other than to just  
14 give you that case that would constitute that as an  
15 outcome. Because, for example, if we win on the current  
16 breach of contract claim, we don't get paid. So you  
17 haven't set a license or a cross-license. We don't have  
18 any way to sue Apple on this counterclaim they say we  
19 should file; and if Apple won that, there's no way for  
20 Apple to make us pay them on the cross-license for their  
21 patents.

22       So it isn't -- it can't be pled in the form of a  
23 complaint, but it could be resolved in the context of  
24 binding arbitration. You could be the arbitrator, but  
25 we can't make a complaint that gives this court the

1 ability to set a rate no matter what, breach or no; and  
2 set a rate for Apple' patents, no matter what, breach or  
3 no. Because you have to bring a claim that can be pled  
4 and we don't have a claim to plead against Apple that  
5 would require them to license their patents to us at a  
6 rate that we would then have to pay.

7 MR. POWERS: May I respond very briefly, Your  
8 Honor?

9 THE COURT: Did you want to say one more thing?

10 MR. SWEDLOW: I guess I did. That's the reason  
11 that we proposed binding arbitration, because the courts  
12 can present, in the context of arbitration, this is the  
13 dispute that we're going to allow whoever that  
14 decision-maker is, an arbitrator to decide. We both  
15 have portfolios. We both want a license. We both  
16 believe ours are valuable and the other side's aren't  
17 valuable. So set a rate for us and both parties will  
18 agree to pay it and be bound by the geography or caps or  
19 lump sums or whatever other term the arbitrator or that  
20 decision-maker feels is the correct decision. But that  
21 doesn't make it part of this case. It just makes it  
22 something we're willing to do and it appears Apple is  
23 willing to do, but only if it was somehow an amendment  
24 to this complaint.

25 THE COURT: Thank you. Mr. Powers.

1           MR. POWERS: Thank you. I think there's two  
2 points there that need to be addressed. The first is  
3 the comment that the Court has jurisdiction or the  
4 ability to decline to exercise declaratory judgment  
5 jurisdiction. And while technically that's true of  
6 course, the law on that is typically that one would  
7 decline to exercise declaratory jurisdiction at the  
8 beginning of the case out of reasons of judicial  
9 economy. And if you read all of the cases about  
10 declining the exercise of declaratory judgment  
11 jurisdiction, all the ones I'm familiar with are at the  
12 beginning of that process. I am not aware of one, and  
13 certainly one has not been cited, where the Court is  
14 asked to decline to exercise declaratory jurisdiction  
15 the day the trial is supposed to start. That obviously  
16 is not very judicially economical.

17           THE COURT: No. It definitely is not.

18           MR. POWERS: And so our view is that law not  
19 only does not support the decision -- a decision to  
20 decline to exercise it now, but it goes the other way.  
21 That's the first point. I think it's quite clear we've  
22 pled declaratory relief for all of these claims and that  
23 declaratory relief is appropriate and concerns about  
24 whether declaratory relief would accomplish everything  
25 everyone might possibly wish to be accomplished isn't

1 really the point. If it would accomplish something, and  
2 it's within the scope of the pleadings, it should be  
3 decided is our view, particularly now that we're at the  
4 first day of trial.

5 The second point I wanted to respond to is the  
6 argument made that there's nothing in the complaint that  
7 could be possibly be used to order payment. Well, that  
8 argument would have been equally true on last Wednesday  
9 when -- and Thursday when Motorola asked for an order  
10 basically saying Apple has to pay whatever you order.  
11 And while some may wish that to have been a condition of  
12 what we're discussing to make the process more  
13 effective, there was not a pleading that remotely  
14 supported that request. Remotely. So Motorola's  
15 concern about the effectiveness of the pleading that  
16 would order the parties to pay is not one that's being  
17 made consistently.

18 The reality is the parties could construct a  
19 pleading that would result in exactly what I've outlined  
20 as option three. It would not be the current pleading,  
21 but it would be a pleading that would say the Court  
22 would set a rate for both and each would pay it, and the  
23 parties would agree to it and we could move forward.

24 So the niceties of what that amendment looks like I  
25 don't think is the problem. I think that's an



1 accomplishable solvable question.

2 THE COURT: And Mr. Powers, I certainly agree  
3 with you that it would have been nice to make this  
4 decision at the outset. But this is an area that none  
5 of us has been in before, and you can just look at the  
6 evolving nature of the briefs, both sides; orders from  
7 the Court trying to find the path through this swamp of  
8 not knowing what's out there; what we're talking about.  
9 None of us could have realized that we would be getting  
10 to the point where we'd be saying wait a minute.  
11 There's nothing here. This is a situation in which one  
12 side wants what will be nothing more than a bargaining  
13 chip.

14 I certainly don't criticize the lawyers on either  
15 side. I think you've done a magnificent job of trying  
16 to help the Court get to a position of understanding  
17 what's involved. But I reach the point where I say this  
18 is not what courts should be doing. They should not be  
19 in a situation in which they're saying you don't have to  
20 offer more than such and such, and you can bargain your  
21 way down from that.

22 I would much prefer, not because I don't want to  
23 hear the evidence, but because I don't think hearing the  
24 evidence is going to make any difference to the outcome  
25 of the case, I would much prefer to have you go to

1 binding arbitration because that is a remedy. The  
2 arbitrator, the panel of arbitrators, whatever you get,  
3 that is a remedy that can be expanded to fit the issues  
4 that are involved in this case. You don't have to have  
5 a perfect pleading. If you want to get credit for  
6 Apple's patents in the discussion of the rate that  
7 you're going to pay for licensing, that can all be  
8 included.

9 The arbitrator can talk about rates, but he can do  
10 it in a way that isn't just picking one out of the air  
11 and just saying okay, this is where -- this is it. You  
12 want six, you want five, let's go five fifty. All of  
13 that is possible for an arbitrator and it's just not  
14 possible for the Court. The Court is in a position  
15 where it has to say yes, no. Binary kinds of decisions.  
16 And in this case I don't think a binary decision is  
17 appropriate because it's not going to move this case,  
18 this dispute to resolution.

19 MR. POWERS: May I offer one more comment on  
20 that, if I may?

21 THE COURT: Um-hmm.

22 MR. POWERS: Let me modify my option  
23 hypothetical which in a way that I think will, at least  
24 for me, help on this point. If Mr. Swedlow and I had an  
25 options contract where I paid him \$50 for the option

1 over the course of a year to buy his old iPhone that he  
2 had to give up when he took this case and the agreement  
3 said that he had to sell it to me at fair market value  
4 at the time -- because I can exercise it over the course  
5 of a year and we both understood that that fair market  
6 value might change. That's the agreement. I give him  
7 my \$50. I then go to him and say "Hi, I'd like to buy  
8 your iPhone," and he says "The price is \$1,000 because I  
9 think it's that special. I think that's the fair market  
10 value for a Swedlow cellphone." And I say "Wow, that  
11 sounds a little steep. I don't think that's fair market  
12 value. I don't think you've complied with your  
13 obligation for which I've paid to offer me your iPhone  
14 at fair market value."

15 So I sue here, assuming jurisdiction is complied  
16 with, and I say make him offer me his iPhone. Make him  
17 do what I paid him for. Now that requires the Court to  
18 decide the fair market value of the iPhone at the time  
19 that I asked for it and there would be evidence on that.  
20 There would be eBay evidence put before you. There  
21 would be various arguments about what that iPhone was  
22 worth. Both sides would put in their evidence. You  
23 would then decide that the price, the fair market value  
24 of the iPhone at the time I asked for it was \$150.

25 THE COURT: The great thing is there would be

1 no jurisdiction for that case.

2 MR. POWERS: I specifically assumed  
3 jurisdiction, but yes, I understand.

4 MR. SWEDLOW: I just want to point out I have  
5 an Android phone, not an iPhone.

6 MR. POWERS: At that point, if you decided that  
7 the fair market value of that phone was \$150, that  
8 doesn't -- that's not a bargaining chip. That's the  
9 offer I get. I accept it or I don't. If I thought the  
10 fair market value of that was \$50 and it's not worth  
11 \$150, I don't buy it. But you have done what the law,  
12 in my view, would require, which is to force Mr. Swedlow  
13 to make an offer at an amount and then I accept or not.  
14 That's completing the contract. I then --

15 THE COURT: You're not going to walk away from  
16 this, Mr. Powers. If I tell you that the amount is  
17 \$10.12, you're not going to accept it, but you're not  
18 going to walk away. That's not the end of the matter.  
19 You still want a licensing agreement with Motorola, and  
20 you've got all kinds of reasons for that. It's just one  
21 step.

22 If I tell you that your option is your telephone or  
23 your option or whatever is \$150, that's the end. Yes,  
24 you walk away. You pay it. Whichever. But that's not  
25 what we're talking about here. We're talking about

1 something that is still very fluid, very much in  
2 dispute. It's going to go on and on and on.

3 My giving you one number out of a whole mass of  
4 other things that have to be decided is not going to get  
5 you -- that's not going to resolve this case.

6 MR. POWERS: None of us knows that for sure.  
7 Your Honor is clearly correct that there are a number of  
8 factors at issue. But it is our view, the reason we  
9 brought this case -- we didn't bring this case because  
10 none of us had anything else to do. We brought this  
11 case because we believed setting that number would do  
12 something meaningful to resolve the dispute.

13 THE COURT: And --

14 MR. POWERS: That's why we did it.

15 THE COURT: -- I disagree with you. I am going  
16 to dismiss it. Now the Court of Appeals may have an  
17 entirely different view of it, and that's fine.

18 MR. POWERS: I assume it's dismissed without  
19 prejudice.

20 THE COURT: Oh, no. It's dismissed with  
21 prejudice.

22 MR. POWERS: We have a bench memo to give you  
23 on that subject because the law, particularly --

24 THE COURT: I'll certainly -- and I will issue  
25 a written opinion and then if you want to make motions

1 for reconsideration of any aspect of it, if you want to,  
2 I will look at your bench memo on prejudice or no  
3 prejudice.

4 MR. POWERS: May I approach?

5 THE COURT: Certainly. Thank you. This is not  
6 the resolution that I would have thought we would --  
7 where we would be months ago when this case was under --  
8 was being developed and when I decided the motion for  
9 summary judgment and all the others, but I simply cannot  
10 see my way to spending court resources to reach the  
11 result that Apple wants. I still have not been  
12 convinced that there is any injury that will be  
13 redressed by the request that Apple has made for relief.

14 So I will get a written opinion out promptly. Of  
15 course you can always file motions for reconsideration.  
16 And of course you may take an appeal. Thank you all.

17 (Proceedings concluded at 11:36 a.m.)

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1 I, LYNETTE SWENSON, Certified Realtime and Merit  
2 Reporter in and for the State of Wisconsin, certify that  
3 the foregoing is a true and accurate record of the  
4 proceedings held on the 5th day of November 2012 before  
5 the Honorable Barbara B. Crabb, District Judge for the  
6 Western District of Wisconsin, in my presence and  
7 reduced to writing in accordance with my stenographic  
8 notes made at said time and place.

9 Dated this 6th day of November 2012.

10  
11  
12  
13 /s/\_\_\_\_\_

14 Lynette Swenson, RMR, CRR, CBC  
15 Federal Court Reporter  
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